Supreme Court, U.S.
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No. 96-1967

In The

Supreme Court of the United States

October Term, 1996

AROMA MANUFACTURING, INC.,

Petitioner,

vs.

ALTERNATIVE PIONEERING SYSTEMS, INC. d/b/a AMERICAN HARVEST,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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10 *Moore's Federal Practice* § 55.22[4][a] (3d ed. 1997) 6

SUMMARY

This case is both very simple and very complex. It is very *simple* in that it involves an erroneous default Judgment for over $1.3 million — incidentally in a patent infringement context — where the damages awarded were based on a product that was *never contemplated within Alternative Pioneering's Complaint* when the default Judgment was entered.

The case is, at the same time, very *complicated* in that Alternative Pioneering confused the trial court and the Court of Appeal, and now attempts to confuse this Honorable Court, by intentionally blurring two entirely different products manufactured by two entirely different companies ("Aroma" and "Imex"). The purpose in that, pursued persistently and shamelessly by Alternative Pioneering, has always been to distort the scope of its Complaint (which related to only *Imex's* product), and thereby deflect scrutiny of the source of the $1.3 million in supposed "lost profits" awarded to it (based upon *Aroma's* product) at the default prove-up hearing.

Here, rather than rehash the settled law concerning due process and the proper scope of default damages — all clearly set forth in our briefs filed in the Court of Appeal and in support of our original Petition for Certiorari — we reply to Alternative Pioneering's opposition simply by: (A) clarifying factually that which Alternative Pioneering has intentionally "muddied" concerning (i) the two separate defendants and their two separate products, (ii) the Complaint upon which default was taken (relating, as it did, exclusively to *Imex's* product), and (iii) the nature of the damages awarded (relating to *Aroma's* product); and (B) explaining, in the simplest possible terms, why this case warrants review by this Honorable Court.

DISCUSSION

I. ALTERNATIVE PIONEERING PURPOSELY CONFUSES THE FACTS TO MISLEAD THIS COURT CONCERNING THE EQUITIES OF AROMA'S PETITION.

Alternative Pioneering dismisses the equities and the larger implications of Aroma's Petition by purposely confusing the most important facts. Here, we reprise the *true facts* as simply as possible.

A. Aroma and Imex Are Two Entirely Separate Companies. They Manufacture Entirely Distinct, Incompatible Products.

Alternative Pioneering's central obfuscation hinges on its intentional blurring of two entirely separate companies, Aroma and Imex Corporation ("Imex"), and the two entirely distinct products they manufacture.

Aroma is an American manufacturer and distributor of cooking appliances. Specifically, as it relates to this case, Aroma manufactures a glass pot convection, resistance-heated, countertop oven, known as the "AeroMatic Oven/AST 900 or 850." Aroma marketed this product — which is manufactured with an optional expansion ring — continuously, without any problem or allegations of infringement, since about 1991. (R. 787.)[1]

Imex — also a defendant in this case, and also a Judgment debtor to Alternative Pioneering (whose appeal was dismissed for failure to file an Opening Brief) — is a Korean manufacturer of cooking appliances. Imex was the manu-facturer of an entirely different "clam shell"-shaped, infrared-heated, counter-top oven, marketed by Imex as the "Infrared Z Oven." *That product was*

1. For consistency with Alternative Pioneering's opposition brief, references to the record filed in the Court of Appeal are abbreviated here as: (R. [page]). References to Alternative Pioneering's Opposition Brief are abbreviated as: (Opp. at p. [page]).

completely incompatible with Aroma's AeroMatic Oven/AST 900 or 850.[2]

Imex had *no* relation to or history with Aroma until sometime in 1994, when Imex expressed interest in having Aroma distribute its Infrared Z Oven in the United States. Aroma insisted first on proper assurances from Imex or its counsel that Imex's product did not infringe any other protected product; and, in April of 1994, Imex's counsel, Azulay & Azulay, wrote to Aroma reporting that "there is no infringement by the Imex device." (R. 1102.) Accordingly, Aroma began to *display* Imex's Infrared Z Oven — identified by Aroma as the "Infrared Oven/AIT 1000" — but Aroma never had any agreement with Imex to distribute the product (R. 874-875); and, in fact, Aroma *never made any sales of Imex's product.* (R. 872.)

B. Alternative Pioneering's Formal Notice of Infringement and its Complaint Related Only to the Infrared Oven/AIT 1000, Not to the AeroMatic Oven/AST 900 or AST 850.

On May 2, 1994, Alternative Pioneering filed its Complaint against Aroma and Imex. (R. 49.) Alternative Pioneering's Complaint did not make any reference to Aroma's AeroMatic Oven/AST 900 or 850 with expansion rings. Instead, in *every critical paragraph*, Alternative Pioneering expressly referenced the Infrared Oven/AIT 1000, the product which Aroma had never manufactured, sole, or even *offered* for sale, ever.[3]

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2. The design particulars of the Infrared Oven/AIT 1000, and of the AeroMatic Oven/AST 900 or 850 and expansion rings, are set forth in detail at R. 740-741, R. 777-779, and R. 780-783 (pictures). We do not repeat those details here, except to note that the products are *entirely different.*

3. Alternative Pioneering clearly misleads this Honorable Court when it suggests, with myopic focus on paragraphs 26 and 27 of its Complaint, that its Complaint is broad enough to cover Aroma's AeroMatic Oven/AST 900 or 850. Alternative Pioneering purposely neglects the immediately preceding paragraph *25* — which expressly and unequivocally provides (Cont'd)

C. The Damages Awarded to Alternative Pioneering Related Exclusively to the AeroMatic Oven/AST 850 or AST 900, Which Was Not Contemplated in the Complaint.

The trial court accorded Aroma two brief extensions of time to respond to Alternative Pioneering's Complaint (in order that Aroma have time to coordinate its representation with Imex, the manufacturer of the supposedly offending product). However, based on misapprehensions explained in our original Petition, the trial court mistook Aroma's third request for an extension as a sham; and, 86 short days after Alternative Pioneering's Complaint was filed, the trial court entered default as to both Aroma and Imex. (R. 124; Doc. No 17.)

Aroma promptly appeared with newly-retained counsel — Azulay & Azulay — and filed a timely motion for relief from default. (R. 126; *see* Doc. Nos. 19, 20, 21, 22.) The trial court, however, denied Aroma's original motion, as well as all of its subsequent efforts to obtain relief in order to defend Alternative Pioneering's Complaint on its merits.[4]

The case proceeded through discovery, which uncovered Alternative Pioneering's intention to expand the scope of its Complaint to include supposedly infringing sales of Aroma's

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(Cont'd)
context for paragraphs 26 and 27 — and which clearly relates the entire Complaint to the Infrared Oven/AIT 1000, *not* the AeroMatic Oven/AST 900 or 850 (upon which damages were ultimately awarded).

4. The trial court's abuse of discretion in failing to grant relief from default was the first basis of Aroma's appeal to the Federal Circuit Court of Appeal. We still believe that the refusal to grant prompt relief was fundamental error which warranted reversal of the trial court default Judgment. Here, however, because of its more "universal" application to *all* of the numerous cases throughout the country involving default judgments, we focus our Petition for Certiorari instead on the critical due process issues relating to the proper *scope* of a default judgment, once taken.

AeroMatic Oven/AST 900 or 850. (*See generally*, R. 732; R. 737; Doc. Nos. 135-139.) Aroma filed a motion attempting to restrict Alternative Pioneering's damages evidence to those matters contemplated within its Complaint; but the trial court denied that motion, and also denied Aroma's request for a full, evidentiary hearing on the damages evidence (despite the fact that the court had previously assured Aroma of such a full, evidentiary hearing). (*See* R. 831; *see also* Doc. Nos. 149-152, 159.)[5]

In short, the court took evidence (by way of un-cross-examined declarations), and found, without any thoughtful analysis, that the Complaint gave Aroma sufficient notice that its AeroMatic Oven/ AST 900 or 850 infringed Alternative Pioneering's patents. Accordingly, the court awarded Alternative Pioneering lost profits totaling over $1.3 million, *all related to sales of Aroma's AeroMatic Oven/AST 900 or 850.*

The error in this respect was compounded by the fact that Alternative Pioneering simply failed to comply with the strict "marking" requirements set forth at 35 U.S.C. § 287(a) with respect to the product it claimed was infringed (an accessory expansion ring to its JetStream oven).[6]

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5. The trial court's refusal to accord Aroma a full evidentiary hearing, despite its essential promise to do so earlier, was another basis of Aroma's appeal to the Federal Circuit of Appeal. We do not discuss that error at length here, but mention it briefly to underscore the inequities of the resulting Judgment, and to emphasize why it is so important to obtain review of this case by this Court to insure that lower courts not simply *assume* they can dismiss a litigant's rights to due process in favor of the court's own notions of judicial expediency.

6. The patent "marking" issue is adequately discussed in our briefs before the Court of Appeal and in our original Petition for Certiorari. It reflects another egregious error by the trial court and the Court of Appeal. Still, we do not discuss it further here, believing, as we do, that the critical issue which makes Aroma's case appropriate for review by this Court is the simple due process issue presented in the text regarding the proper scope of a default judgment.

D. In Sum, Alternative Pioneering Sued Aroma Over One Product, But then Was Allowed to "Prove" its Damages With Reference to an Entirely Different, Unrelated Product.

In conclusion, then, Alternative Pioneering sued Aroma, because Aroma was supposedly infringing its patents by selling the Infrared Oven/AIT 1000. Later, after Alternative Pioneering discovered that Aroma had never even marketed the Infrared Oven/AIT 1000 for sale, and never sold a single unit of that product, it capitalized on Aroma's status in default to "switch" the focus of its Complaint to Aroma's AeroMatic Oven/AST 900 or 850. Supposed "lost profits" damages — in excess of $1.3 million! — were then awarded with reference to that "switched" product.

This is in gross violation of the rule established by Rule 54(c) that "[A] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment," and is in gross violation of the settled principle that a default judgment in excess of the pleading is void for want of jurisdiction and want of due process. (*See, e.g., Sylvan Beach, Inc. v. Koch*, 140 F.2d 852, 821 (8th Cir. 1944). *See also Alan Neuman Productions, Inc. v. Albright,* 862 F.2d 1388 (9th Cir. 1988): "[F]acts which are not established by the pleadings of the prevailing party, or claims which are not well-pleaded, are not binding and cannot support the judgment." *See also* 10 *Moore's Federal Practice* § 55.22[4][a], p. 55-42 (3d ed. 1997). *See also Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 683 (2d Cir. 1993) (party's recovery is limited to that prayed for in its Complaint).)

Here, that means that Alternative Pioneering's recovery should have been limited to provable damages — which would have been *nothing* — stemming from Aroma's sales of the Infrared Oven/AIT 1000.[7]

7. In addition, because all of Alternative Pioneering's damages, as well as the trial court's assessment of Aroma's supposedly "culpable" conduct, (Cont'd)

II. THIS CASE COMPELS THIS COURT'S ATTENTION TO CORRECT A GROSS, SINGULAR INJUSTICE, AND TO PROVIDE THE LOWER COURTS WITH MUCH-NEEDED GUIDANCE ON MATTERS OF CRITICAL PUBLIC IMPORTANCE CONCERNING DUE PROCESS.

There are compelling reasons why this case is appropriate for Supreme Court review. Most importantly, the case offends every first-year law school principle of due process, that is, notice and an opportunity to be heard. (*See, e.g., Sylvan Beach, Inc. v. Koch,* 140 F.2d 852, 821 (8th Cir. 1944) ["[T]he court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. . . . The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play."].) Here, the bottom line is a default judgment with supposed damages in excess of $1 million calculated with reference to a product that was definitively *not* included in Alternative Pioneering's Complaint at the time Aroma's default was taken. That is shockingly wrong, and because it is such a critical principle, it is apparent that the lower courts require the oversight function of this Court to insure its consistent application and the proper functioning of the federal judiciary.

Finally, this Court should grant certiorari because this case represents a gross inequity (in excess of $1.3 million) to one small, family owned business which, quite simply, did not do anything wrong. In short, where justice is so clearly denied to even one small American company, justice is denied to all Americans. Review here would, accordingly, send a powerful and proper message to all lower courts that every case must be decided with reference to the proper

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(Cont'd)
were based upon Aroma's sales of its own AeroMatic Oven/AST 900 or 850, the attorneys' fees awarded to Alternative Pioneering as a result of such supposedly "culpable" conduct should also be reviewed, and ultimately reversed.

rules of law, and not according to the whim and fancy of one trial court judge who would not invest the time or energy into uderstanding the simple facts and law which govern this case.

CONCLUSION

For all the reasons stated here and in our original Petition, we respectfully ask that the Court grant review of this case and permit the parties to file more extensive briefs on the merits of the issues presented.

Respectfully submitted,

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